IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 129 of 1999

Sitaram Pandurang Chavan .. Appellant
(Orig.Plff)

V/s

1. Shivaji Aba Chavan,
2. Vasudev Aba Chavan,
3. Saraswatibai Aba Chavn
since deceased thropugh heirs
at Respondent nos.1,2 and 4 to 6
4. Leela Yeshwant Palav,
5. Nilini Ramchandra Shingare
6. Sou. Hemalata Vinayak Parab
7. Anant Pandurang Chavan
8. Rajaram Pandurang Chavan
deceased his L.Rs
A Prabhavati Rajaram Chavan,
B. Pandurang @ Bala Rajaram Chavan .. Respondents
(Orig.Defts)

Shri G.N.Salunke for Appellant

Shri G.R.Rege with L.G.Waingankar for Respondent no.1

CORAM:S.R.SATHE,J.

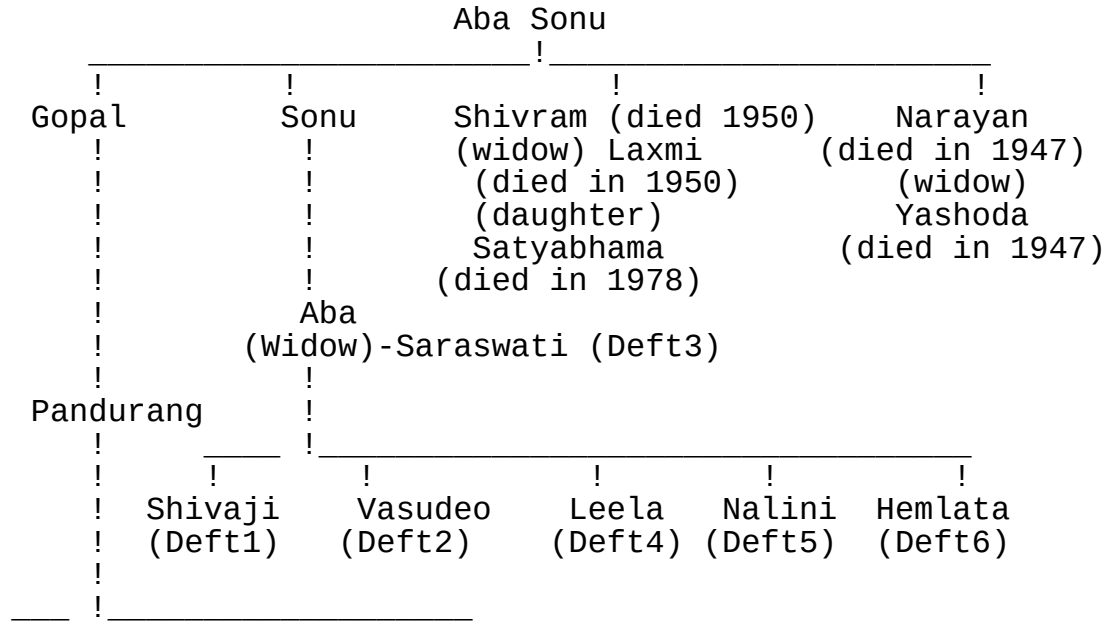
DATED: 16th March 2007

ORAL JUDGMENT :-

1. The Appellant -original plaintiff in Regular Civil Suit NO.21 of 1979 has preferred this Appeal against the judgment and order passed by the Court of the Joint District Judge, Sindhudurg-Oros in Regular Civil Appeal NO.163 of 1984 whereby decree for partition and separate possession passed in favour of the plaintiff by the Joint Civil Judge,J.D., Malwan was set aside and the suit was dismissed.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

3. In order to appreciate the facts of the case it would be worthwhile to set out genealogy which would indicate the relations between the parties.



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Sitaram (Plff.)	Anant (Deft.7)	Rajaram (Deft.8)

4. Plaintiff Sitaram Pandurang Chavan filed Regular Civil Suit No.21 of 1979 stating therein that the suit properties described in para 1A of the plaint are the joint family properties of the plaintiff and defendants. According to the plaintiff, the suit properties were initially owned by their common ancestor Aba Sonu Chavan i.e. great grand father of the plaintiff. After the death of Aba Sonu Chavan, his four sons viz. Gopal, Sonu,Shivram and Narayan inherited the property. All of them were cultivating the suit land jointly and partition had never taken place between them. Thus it is plaintiff's case that he is having 8 anna share in the suit properties described at Sr.No.1 to 4 while in properties at Sr.Nos.5, 6 and 7 he is having 10 anna shares. The property mentioned at Sr. No.29 which is house property was partitioned previously and each sharer is having possession of his respective share in the said property. It is plaintiff's case that Narayan, brother of his grand father Gopal died prior to 1947 and his wife Yeshoda also died in the year 1947. After her death her property devolved to the share of the father of the plaintiff and defendants. Similarly Shivram, brother of plaintiff's grand father died prior to 1950 and his wife Laxmi died in the year 1950. Her property was devolved to her daughter Satyabhama. However, prior

to her death in 1978, Satyabhama sold her 1/4th share in the suit property mentioned at Sr.Nos.5, 6 and 7 to plaintiff by registered sale deed dated 22-1-1963. It is plaintiff's case that as the suit properties were joint it became difficult to carry out improvement in the suit property. Besides that, there often used to be quarrels on account of the land. The plaintiff therefore filed the present suit for partition and separate possession of his share.

5. Though plaintiff included properties at Sr.Nos. 8 to 28 as joint family properties he averred that there are many other sharers in the said property and most of the properties are in possession of tenants and as such he did not claim any partition in the said property. It is also alleged that the plaintiff and his mother Satyabhama had previously filed Regular Civil Suit NO.72 to 1959 for partition and separate possession of joint family properties. However, with the permission of the Court plaintiff withdrew the said suit on 25-3-1967. Thus, according to him plaintiff's action of filing such suit will not operate as a bar to the present suit.

6. The defendant no.1 filed his written statement at Exh.30 and opposed the suit claim. He admitted the relationship between plaintiff and defendants. However, contended that there is no joint family of the plaintiff and dependants and oral partition has already taken

place long back in between the plaintiff and defendants' ancestors. Thus, according to the defendants as partition had already taken place plaintiff's suit for partition was not tenable. The defendant also denied all other allegations of the plaintiff and prayed for dismissal of the suit.

7. The defendant no.2 filed purshis Exh.31 and adopted the written statement filed by the defendant no.1.

8. The defendant nos. 3 to 8 remained absent though duly served and the suit proceeded exparte against them.

9. On the pleadings of the parties, the learned trial Judge framed issues at Exh.32. In order to prove the suit claim plaintiff examined himself at Exh.56 and also produced certain 7x12 extracts, revenue assessment receipts and copy of sale deed executed by Satyabhama.

10. As against this, defendant no.2 examined himself at Exh.59. He also produced khata extract and assessment receipts along with Exh.61.

11. After considering the evidence of both the parties, the learned trial Judge came to the conclusion that defendants have failed to prove that the partition had already taken place between plaintiff and defendants' ancestors. He therefore held that plaintiff is entitled

for partition and separate possession and therefore decreed the suit in plaintiff’s favour.

12. Being aggrieved by the above mentioned order. the original defendant no.1 filed Regular Civil Appeal No.163 of 1984. After hearing the arguments of both the learned Advocates, the learned Joint District Judge, Sindhudurg Oros came to the conclusion that the decree passed by the learned trial Trial Judge was not legal and correct and the partition had in fact taken place long back between the plaintiff’s grand father and his brothers. Naturally, he allowed the appeal and dismissed the plaintiff’s suit.

13. The above mentioned order passed by the first appellate court is challenged in the present second appeal. From the perusal of the record it appears that while admitting the appeal this Court has formulated following substantial question of law :-

> "Whether the lower appellate court erred in holding that the partition was already effected between the parties without there being any evidence to that effect?"

14. In this appeal before me, Shri Salunke, learned advocate for the plaintiff has urged two points, Firstly, he submitted that the learned first appellate

court has not properly appreciated the evidence on record. Secondly, he canvassed before me that the learned trial Judge has given undue importance to the entries in the revenue record. According to him, the entries in the revenue record showing separate possession cannot be regarded as proof of partition and title to the land. He, therefore, submitted that in the absence of any documentary evidence adduced by the defendants regarding partition the first appellate court wrongly held that the partition had already taken place between the plaintiff and defendants' ancestors and the suit is liable to be dismissed. He, therefore, submitted that the appeal be allowed and the decree passed by the trial Court be restored.

15. As against this Shri Rege, learned Advocate for the defendants supported the judgment and order passed by the first appellate court. He submitted that though there is no document of partition the other evidence, circumstances and the conduct of the parties clearly go to show that the partition had already taken place between the parties long back. He, therefore, submitted that the appeal be dismissed.

16. The relation between the parties is not in dispute. It is also an admitted fact that the properties mentioned in Schedule A i.e. properties 1 to 7 were initially owned by Aba. It is nobody's case that Aba

had divided his property amongst his four sons. Thus the suit property was initially joint family property of plaintiff's grand father and his brothers. However, it is the contention of the defendant nos.1 and 2 that partition had taken place between the plaintiff's grand father and his brothers. Admittedly, there is no document of partition. However, it is needless to say that in the absence of any specific document regarding partition it cannot be said that there was no partition at all. After all partition is a severance of joint status. All that is necessary therefore to constitute a partition, is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severality. It is well settled that where there is no any document of partition in such a case, when the question arises as to whether there has been a partition or not, the intention of the parties as to separation can only be inferred from their acts. The question is one of the fact to be decided with due regard to the cumulative effect of all the facts and circumstances, and primarily burden of showing that there has been a partition is on the person setting it up.

17. Bearing in mind the above position of law, let us scan the evidence on record and find out whether the learned first appellate court was justified in holding that the suit property was already partitioned and as

such the plaintiff was not entitled to file the suit for partition.Firstly,it must be noted that the plaintiff has stated in his deposition that they have a common vahiwat in the suit lands and no partition was effected between their branches. However, in the cross examination he has stated :

> "I cannot tell whether my grand father and his brothers were cultivating the suit land jointly or separately".

So, this admission of the plaintiff itself shows that the plaintiff is not even sure as to whether the status of their family has remained joint and whether the joint family has joint family property. As against this, the defendant nos.1 and 2 have come out with a specific case that partition has taken place between 4 sons of their common ancestors long back and accordingly each branch was having separate vahiwat of the property allotted to their respective share. This position is in fact admitted by the plaintiff in the cross examination because he has said

> "Our possession and vahiwat in the suit lands is shown in the Commissioner’s map Exh.35 and the map regarding our vahiwat is correct".

If we see the Commissioner’s map Exh.35 which is not

disputed by the plaintiff it is very clear that the plaintiff and defendant nos.1 and 2 are having separate possession in the suit lands and they are cultivating the suit lands separately. Plaintiff has nowhere stated that such a separate cultivation was carried out by them only for the sake of convenience. Naturally, when we find that the lands are being cultivated separately and there are separate 7x12 extracts in respect of the said land and they are standing in the name of respective share holders, then it must be held that lands were partitioned between the branches and as a result of the same revenue entries in respect of the lands were made accordingly and separate 7x12 extracts and Khatas have been prepared. The defendants have produced at Exh.61 revenue receipts. From the perusal of the said receipts it is very clear that the said receipts are standing in the names of different share holders in respect of their respective lands. What is more to be noted is that each holder is having a separate Khata. Thus the above mentioned revenue entries in the revenue record certainly help the defendants to prove that the lands were partitioned and cultivation was carried out as per partition. So, only for this limited purpose the above mentioned record has to be looked into. The proposition advanced by the learned Advocate for the plaintiff that entry in 7 x 12 extract by itself does not confer any title to the holder is not disputed and cannot be disputed. But that does not mean that such record

cannot be used to prove the contention of previous partition. In support of his proposition, learned Advocate for the plaintiff has relied upon:

i) AIR 1997 SC 2719 - Balwant Singh v. Daulat Singh
ii) AIR 1997 SC 2181 State of HP V Keshav Ram
iii)AIR 1995 SC 1377 Nagar Palika Jind V Jagat Singh,&
iv) 1996 (1) Mh.L.J. Abasaheb B. Gharge and anr. V/s. Balaji R. Gharge

However for the reasons mentioned above these authorities do not any way help the plaintiff. So, in the absence of plaintiff's specific case that such arrangement was made only for the sake of convenience, under the circumstances of the case, it must be held that partition had taken place between plaintiff's grand father and his other brothers. In fact that is why we find that when Shivram died, the property of Shivram devolved to his wife Laxmi and when Narayan died his property devolved on Yeshoda.It is true that cesser of commensality is not a conclusive proof of partition but it is certainly an important piece of evidence which lends support to the theory of partition. The very fact
that branch of plaintiff and the other branches are having separate occupation of the suit lands, they are taking income separately, paying revenue assessment separately and having separate Khatas, in my opinion

clearly indicate that contention of the defendant is true and correct. We also cannot ignore the fact that this separate possession and cultivation is in existence for a very long time. It is pertinent to note that even the plaintiff has clearly admitted in his cross examination that their separate possession in the suit land was since before his understanding. So, this also indicates that the case of the plaintiff is not true and correct.

18. There is another aspect of the matter. We find that even in the plaint the plaintiff has averred that so far as the property mentioned at Sr.No. 29 i.e. house property is concerned, it is partitioned previously and the plaintiff and defendants are in separate possession of their respective shares in the said property. Thus in a way plaintiff has averred the theory of partial partition. When such was the position it was also necessary for the plaintiff to show that though house property was partitioned, for particular reasons the suit land was not partitioned at that time. But we find that the plaintiff has not adduced any cogent and convincing evidence in that behalf. So, it must be held that the partition of all the joint family properties had taken place between the plaintiff’s grand father and his brothers. However, unfortunately we find that the learned trial Judge has given undue importances to the defendants’ statement in the cross examination

that he was not in a position to tell as to when the partition took place between his grand father and their brothers. That statement was certainly not sufficient to destroy the case of the defendants because according to him such partition had taken place quite long before.

19. It has also come on record that in the year 1959 plaintiff had in fact filed a suit for partition. It is alleged by the plaintiff that he withdrew the said suit with permission of the court to file fresh suit. That was done according to him 8 years after the filing of the suit. Thereafter he kept mum for 12 years and then filed the present suit on 23-3-1979. There is nothing on record to show that the previous suit was withdrawn with permission. So, under such circumstances we can also say that realising the fact that he had no evidence to prove the partition he must have withdrawn the said suit.

20. Thus, having regard to all the facts and circumstances of the case, evidence on record and preponderance and probabilities it is clear that defendants and even their grand father had intimated, indicated and represented by their conduct that the property has already been partitioned and even the plaintiff and his grand father were also knowing about the same and that is why they kept mum for all these years. So, I have no hesitation to hold that the

learned first appellate court has considered the entire evidence in its proper perspective and rightly held that the partition of the suit property had already taken place long back and as such plaintiff's suit for partition is not maintainable. There is no necessity to interfere with the said finding. The judgment and order passed by the first appellate court is legal and correct.

21. In this view of the matter there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE,J.)